

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

MICHAEL AVENATTI,

Defendant.

**ORDER**

(S1) 19 Cr. 373 (PGG)

PAUL G. GARDEPHE, U.S.D.J.:

On January 27, 2020, Nike, Inc. moved for an order pursuant to Federal Rule of Evidence 502(d), stating that testimony by Nike counsel at trial would not constitute a waiver of any privilege or protection that Nike currently enjoys. See Jan. 27, 2020 Nike Ltr. (Dkt. No. 217); Proposed Order (Dkt. No. 217-1)) Scott Wilson, outside counsel for Nike, is currently testifying at trial, and other Nike lawyers may be called to testify.

Fed. R. Evid. 502(d) provides that “[a] federal court may order that [a] privilege or protection is not waived by disclosure connected with . . . litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding.” Fed. R. Evid. 502(d).

Testimony by Nike counsel at trial will not constitute a waiver of any privilege or protection that Nike currently enjoys. Given that Wilson will soon be cross-examined, and that it is possible that other Nike counsel may be subject to cross-examination, there is no practical way for Nike to attempt to police its privileges and protections and insure that they are not waived, either intentionally or inadvertently by lawyers who are not authorized to waive Nike’s privileges and protections. Accordingly, Fed. R. Evid. 502(d) is applicable, and the relief Nike seeks is appropriate.

As stated today in open court, this Order speaks only to testimony by Nike counsel at trial, and does not address any disclosures made by Nike counsel prior to today's date, or the effect of such disclosures. See Fed. R. Evid. 502 advisory committee note (a court "may not enter an order determining the waiver effects of a separate disclosure of the same information in other proceedings, state or federal"),

Dated: New York, New York  
January 30, 2020

SO ORDERED.

Paul G. Gardephe  
Paul G. Gardephe  
United States District Judge